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# In the Supreme Court of the United States

OCTOBER TERM, 1963

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No. 612

JOHN MILTON ADDISON, ROBERT C. OLSON, WILLIAM D. GROOM, JAMES D. (BOB) SCOGGINS, JOHN R. METZ, AND MILES A. WHITE, PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–19) is reported at 317 F. 2d 808.

### JURISDICTION

The judgment of the court of appeals was entered on May 24, 1963, and a petition for rehearing was denied on September 12, 1963. By order of Mr. Justice Black, the time for filing a petition for a writ of certiorari was extended to and including

November 11, 1963. The petition for a writ of certiorari was filed on November 12, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether illegally procured evidence was introduced against petitioners at the trial.

2. Whether petitioners were denied access during the trial to files and records which were impounded pursuant to a bankruptcy order.

3. Whether petitioners were prejudiced by the court reporter's failure to record the arguments of counsel to the jury.

4. Whether the trial court committed any other prejudicial error justifying reversal.

## STATEMENT

A jury convicted petitioners in the United States District Court for the Northern District of Texas, under seven counts of an indictment[1] charging them with mail fraud in violation of 18 U.S.C. 1341, under four counts charging them with stock fraud in violation of 15 U.S.C. 77q(a), and under one count charging them with conspiracy in violation of 18

[1] The indictment contained twenty-four counts, each of which named the six petitioners and four others as defendants (R. 2417–2462). Four other defendants were not tried; ten counts of the indictment were dismissed on motion of the government; and the jury found petitioners not guilty on two counts charging violations of 15 U.S.C. 77e(a)(2) and 77e(c) (R. 2417–2462, 2816–2821, 2864–2875, 3241–3242).

U.S.C. 371 (R. 2417–2462).[2] Each petitioner was sentenced to a term of imprisonment, and, except for petitioner Groom, each was fined (R. 2864–2875).[3] The convictions were unanimously affirmed by the court of appeals (Pet. App. 1–19; 317 F. 2d 808).

The pertinent facts may be summarized as follows:

1. The scheme devised by petitioners consisted of obtaining "loans" from various persons throughout the country by representing that large sums of money could be earned from petitioners' ownership of uranium deposits and control of the patents on an invention which could transform low-grade uranium ore into a marketable product. Before 1957, petitioners represented to prospective lenders that petitioner Ad-

[2] The record contains nine volumes, the pages of which are numbered consecutively 1–3400, and the several briefs filed in the court of appeals. Volume eight (pages 2895–3225) consists of a transcript of a hearing in the district court to supplement the record pursuant to Rule 39(b)(1) of the Federal Rules of Criminal Procedure and Rule 75(h) of the Federal Rules of Civil Procedure. Since petitioners contest the validity of the procedure used to supplement the record, references in this brief to volume eight have been distinguished from references to other portions of the record. Volume eight has been referred to as "Supp. R.," and the other portions of the record have been referred to as "R."

[3] The sentences received by petitioners were consecutive on some counts and concurrent on others. The total time to be served and fines to be paid by each petitioner are as follows:

Addison—15 years, $36,000.
Olson—2 years, $5,000.
Groom—5 years.
Scoggins—2 years, $5,000.
Metz—2 years, $5,000.
White—7 years and 1 day, $21,000.

dison and his associates owned vast holdings of property (some 200,000 acres) rich in marketable uranium ore, and that the brokerage firm of Merrill Lynch, Pierce, Fenner & Beane had offered $18,000,000 for a 49 percent interest in these holdings (*e.g.*, R. 35–37, 240–241). Before the sale could be completed, petitioners required a small sum of money, usually represented to be about $75,000, in order to perform certain mining operations (*e.g.*, R. 35–37). Then petitioners would solicit loans at 6 percent interest which were to be repaid within ninety days, when the sale to Merrill Lynch was to take place (*e.g.*, R. 37–38). As further consideration for the loan, the lender was to receive a specified percentage of gross sales of all products developed by petitioner Addison within the next fifty years, and petitioner Addison would purchase life insurance in the amount of the loan naming the lender as beneficiary (*e.g.*, R. 37–38, 57–58). The lenders were told that they would all be millionaires (*e.g.*, R. 38).

In the summer of 1957, the scheme was altered. As of that time, new loans, as well as renewals of old loans, were solicited through representations that, although the sale to Merrill Lynch had not materialized—it was said that petitioner Addison refused to sell when the brokerage firm demanded a controlling interest in the enterprise—even more money could be earned through petitioner's ownership of the patents on the invention called the Benson Upgrader which would upgrade the uranium content of ore five to ten times (*e.g.*, R. 270–275, 364–365). Specifically, it was

represented that petitioner Addison, with the backing of the family of Clint Murchison, a nationally known financier, had formed a corporation entitled Murchison Ventures, Inc., which would manufacture and lease Benson Upgraders (*e.g.*, R. 42–43, 111, 276–277). It was claimed that the invention would revolutionize the uranium industry, and could be leased to uranium mills which manufacture "yellow cake" (the form in which uranium ore is sold to the Atomic Energy Commission) (*e.g.*, R. 42–43, 271–273, 321, 369). This invention, it was represented, had rendered obsolete existing processes of making "yellow cake" (*e.g.*, R. 49–50, 272–273). Petitioners estimated that the leases would yield daily profits of $50,000 to $86,000 (*e.g.*, R. 43, 109, 321, 364). However, before production of Benson Upgraders could begin, a small sum of money was required for incidentals or for an attachment to the upgrader (*e.g.*, R. 111, 274). Each lender would enter a written agreement reciting that petitioner Addison would repay the loan within one year at 10 percent interest, and that the interest was the sole consideration for the loan. Accompanying the written agreement were oral representations: first, that the loan would be repaid in a lesser time, usually thirty or ninety days; and second, that the lender would receive an unspecified percentage of future profits provided he retained faith in petitioner Addison and did not talk to lawyers or law enforcement officials (*e.g.*, R. 44–64, 117, 269–276, 365–381). The lender would also be told that the promise to pay a percentage of the profits could not be embodied in the

written agreement because petitioners did not possess the licenses required by state laws to sell securities (*e.g.*, R. 51–64).

Included in the scheme were representations that petitioners owned properties with timber valued at $1,000,000 as well as the largest vein of nickel in North America (R. 108–109, 331, 364). To some lenders, representations were made that the Atomic Energy Commission had valued one of petitioner's uranium mines at $1,500,000 or $2,000,000 (*e.g.*, R. 35, 112–113). Those without money to lend were asked to participate in the scheme by working for petitioners without salary in Denver, Colorado, or at their various properties (*e.g.*, R. 411–438, 664–686). As a reward for their faith in petitioner Addison, these workers were promised back salaries and a large percentage of future profits (*e.g.*, R. 411–438, 664–686). Another component of the scheme consisted of the representation that petitioner Addison was building a large resort hotel, named the "Dolly-O" in honor of his mother, on a plateau overlooking Denver (*e.g.*, R. 371–372). It was said that, at the groundbreaking in thirty or ninety days, special trains would transport lenders to the hotel for a "pay-off celebration", at which time the loans and interest would be paid, and each lender would be given a new ten-dollar bill which he would take to petitioner Addison, sitting on a stage in a large auditorium, and exchange for a document entitling him to a percentage of all present and future profits (*e.g.*, R. 379–380).

2. Petitioners moved to suppress files and records, including a record of all persons who had loaned money to petitioners, which had been seized by state authorities. At the pre-trial hearing on the motion to suppress, it was shown that the state authorities had acted pursuant to a search warrant later found invalid by a state court (R. 2519–2626, 2568–2569). The testimony also showed that federal officers inspected the records and compiled a list of lenders (R. 2546–2549, 2564–2565, 2585–2586). The records were in the possession of the United States Attorney for three or four months, and he removed seven letters from the files before returning them to state authorities (R. 2549, 2552, 2586–2587). Except for the seven letters and some personal effects previously returned to petitioner Addison, state authorities brought all the seized records to the hearing and placed them at the disposal of the district court. The record shows that the state officials seized ten file cabinets; that in order to facilitate transportation of the records, the contents of eight cabinets were transferred to the remaining two; that two cabinets containing all of the seized records were brought to the hearing; and that the eight empty cabinets were at the place of storage and would be produced at the request of either party of the court (R. 2532–2533, 2542–2544, 2552). The seven letters were introduced into evidence at the hearing by the United States Attorney (R. 2586–2587). Evidence at the hearing also showed that state and federal agencies had been investigating

petitioners' activities prior to the disputed search and seizure (R. 2587–2588). Over petitioners' objections, the government introduced into evidence at the hearing the list of lenders whose identities had been learned through examination of the seized records rather than through the earlier investigations (R. 2585–2588, 2614–2616).[4]

The district court overruled the motion to suppress without prejudice to its renewal at the trial (R. 2723–2724). When the trial opened, petitioners' counsel stated that the motion to suppress was being "carried along," but no objection was made to the introduction of particular evidence because of the search and seizure (R. 28).

3. Petitioners' brief in the court of appeals asserted that (a) the court reporter did not record the examination of the veniremen or the arguments of counsel to the jury (p. 14); (b) the grand jury used the records seized by the state authorities (pp. 20–21); (c) illegal evidence was received at the trial (pp. 103, 105, 107, 110–113, 115–116); and (d) defense files were impounded pursuant to a bankruptcy order on a day when defense witnesses were testifying, and petitioners were denied access to them (pp. 95–101).

Since the record did not reflect the basis for these contentions, the United States Attorney moved in the district court to supplement the record pursuant to Rule 75(h) of the Federal Rules of Civil Procedure, made applicable to criminal cases by Rule 39(b)(1)

[4] We have lodged this list, Gov. Ex. 1 at the hearing, with the Clerk of the Court.

of the Criminal Rules. After a hearing, the district court ordered the record supplemented and submitted to the court of appeals. The record, as supplemented, shows: (a) that the examination of the veniremen had been recorded but not transcribed because petitioners had not designated it as part of the record (Supp. R. 2965–2968, 3037–3038).[1] Counsel for each defendant had informed the court reporter that it would not be necessary for him to record the jury arguments and petitioners had made no objection to the government's argument (Supp. R. 2965–2968, 3038). (b) The records seized by state authorities were not used by the grand jury (Supp. R. 2919, 2934–2936, 2987–2988, 3038). (c) Except for personal effects returned to petitioner Addison, all files and records seized by state authorities were introduced at the hearing of the motion to suppress evidence. Since the date of the hearing to suppress evidence, until well after the trial, the seven letters were in the custody of the clerk of the court, and the other evidence seized was in the custody of the marshal. None of the seized evidence was introduced at the trial (Supp. R. 2919, 2934–2940, 2945–2948, 2952–2954, 3038–3039).[2] (d) Pursuant to a bankruptcy petition, the United States Marshal impounded records belonging to petitioner Addison on February 15, the day after both

[1] The examination is now part of the record (R. 3226–3281).

[2] Testimony at the hearing on the motion to supplement the record showed that, at the conclusion of the pretrial proceedings on the motion to suppress, the court, in the presence of counsel for petitioners, directed the marshal to take custody of the seized records and lock them up (Supp. R. 2940, 3039).

the government and defense rested their cases. On that day counsel for petitioners were told by the district judge that they would be "afforded access to any records upon request" (Supp. R. 3033–3034, 3039–3040, 3217–3223).

The court of appeals affirmed the conviction. The affirmance was not based on the evidence contained in the supplemental record (Pet. App. 5, 7–8, 18).

## ARGUMENT

1. Petitioners' contention (Pet. 7–16, 20–24) that the trial was tainted by illegally obtained evidence is without foundation. Nothing in the record, original or supplemental, indicates that either the physical evidence seized by the state officers or its fruits were used at the trial.

At the hearing on the motion to suppress evidence, the government showed the independent origin of the evidence which it introduced at the trial by producing at the hearing on the motion to suppress a list of the lenders whose identities had been learned through inspection of the records seized by the state. Of the 15 or more investors who testified at the trial, the names of only two appear on the list: William F. Stroud (R. 1762–1843) and Mrs. Inez Huie (R. 523A–554). The inclusion of Stroud's name on the list was an oversight since he testified at the trial that federal investigators had interviewed him on June 3, 1959, which was seven days before the state seizure occurred (R. 1796, 2530–2531). As to Mrs. Huie, two other witnesses, whose names were not obtained from state records, knew her intimately and knew that she had loaned money to

petitioners (R. 523A, 526, 533, 554, 580). The government would, therefore, have almost certainly learned of her identity even if the seizure by state officers had not occurred.

In the face of this showing by the government, petitioners had the duty of objecting to specific evidence which the government introduced in order to claim that they were convicted on the basis of tainted evidence. See *Lawn* v. *United States*, 355 U.S. 339, 355–356; *Nardone* v. *United States*, 308 U.S. 338, 341; *United States* v. *Costello*, 255 F. 2d 876, 880 (C.A. 2), certiorari denied, 357 U.S. 937. They made, however, no objection at the trial beyond the general assertion that the motion to suppress was being "carried along." They have not either in the court of appeals or in this Court pointed to any evidence based on the illegal state search.

It was thus unnecessary, as the court of appeals found, to rely upon the supplemental record to refute petitioners' claim that tainted evidence was introduced. The supplemental record merely serves to support what the trial record makes evident, that none of the physical evidence seized by the state authorities was used at the trial.[7]

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[7] Petitioners state (Pet. 10) that eight of the ten filing cabinets, which had been illegally seized, disappeared. Even if this were true, this would not justify reversal of their conviction since no tainted evidence was introduced and petitioners do not state that they needed these materials for any trial purpose. It would merely mean that petitioners were entitled to their return. Moreover, the record of the pre-trial motion to suppress, as well as of the supplemental record, shows that no evidence disappeared.

2. Nor does the record support petitioners' claim (Pet. 16–17, 25–27) that they were denied assistance of counsel because defense files were impounded in the middle of the trial pursuant to a bankruptcy order. Petitioners made no such assertion while they were putting in their defense; the only reference in the original record to this matter is a motion for mistrial which was filed on February 15, 1961, the day after all the parties rested their case (R. 2302, 2337–2339, 2790–2791). The original record does not indicate when the impounding occurred, the nature of the materials impounded, or whether the impounding deprived petitioner of access to the materials. On the other hand, the supplemental record shows that the impounding occurred on the day after the parties rested and that, even after that date, the impounding in no way restricted petitioners' access to the materials (Supp. R. 3033–3034, 3039–3040, 3217–3223). Thus, on the original record, petitioners' allegations are made without foundation; on the supplemental record they are shown to be untrue. Either way, the claim is without merit.

3. There is no merit to petitioners' contention (Pet. 27–29) that the court reporter's failure to record the arguments of counsel to the jury entitles them to a new trial or, in the alternative, to a hearing on whether the failure was prejudicial. The court reporter has a statutory duty to record these arguments (28 U.S.C. 753(b)) but the mere fact that the arguments were not reported is not *per se* reversible error. Petitioners must show a substantial claim that substantive error occurred during the jury arguments

which could not be presented for appellate review without a transcript. *Brown* v. *United States*, 314 F. 2d 293 (C.A. 9); *Strauss* v. *United States*, 311 F. 2d 926 (C.A. 5), certiorari denied, 373 U.S. 910; cf. *Stephens* v. *United States*, 289 F. 2d 308 (C.A. 5); *Parrott* v. *United States*, 314 F. 2d 46 (C.A. 10). In the instant case, petitioners did not object at trial to the government's summations, and do not now point to any particular error occurring during these summations.*

Petitioners' reliance on *Brown* v. *United States*, *supra*, for their contention that they should have been allowed to supplement the record is misplaced. In that case, where the jury arguments were not reported, the court of appeals held that a new trial would not be granted to an accused who did not claim that error occurred during the unreported proceedings, and that if the accused alleged that prejudicial error occurred during the unreported arguments, he was required to use Rule 75(n) of the Federal Rules of Civil Procedure to create a record as to what had occurred. In fairness to the defendant, the court postponed affirming the conviction until after the accused had had an opportunity to use Rule 75(n) in the district court. The rationale of *Brown* is not applicable to this case, for here a Rule 75 hearing has already been held—the hearing to supplement the record pursuant to Rule 75(h), which is the equivalent

* While it is true that petitioners characterize the government's argument as "inflammatory" (Pet. 17, 27), they make no attempt to support this broad conclusion or complain of any specific error in the arguments.

of the hearing contemplated by Rule 75(n). Not only have petitioners refused to invoke Rule 75 in the district court, but they opposed the government's efforts to accomplish the same end—to make the unreported proceedings a matter of record.[9] Since petitioners had ample opportunity to invoke Rule 75, there was no reason for the court of appeals to have postponed disposition of the instant case.

4. The other contentions advanced by petitioners (Pet. 16, 17, 25, 29) are plainly frivolous. The court of appeals had no need to rule on petitioners' motion to strike the supplemental record because the court did not find it necessary to rely on the supplement in affirming the convictions (see Pet. App. 5, 7–8, 18). Similarly, none of the arguments we have made above depend on the supplemental record. As we have shown, that record merely confirms that petitioners' contentions are without merit.

Petitioners' examination of the veniremen showed that newspaper publicity did not in fact influence the jury, and the district judge was diligent in his efforts to insure that newspaper publicity did not adversely affect the trial, such as by telling the jury not to read any newspaper stories concerning the case (R. 23–25, 2761–2768, 3234–3264). It is well established that the trial court has broad discretion in determining

[9] The supplemental record made on the government's motion in the district court shows that 28 U.S.C. 753(b) was not violated at all. The supplemental record shows that petitioners waived their right to have the summation transcribed. It was proper to supplement the record on this point since such a matter does not normally appear in the original record.

whether a change of venue is required and whether the defendant has been prejudiced by newspaper publicity during the trial. *E.g., Marshall* v. *United States*, 360 U.S. 310, 312; *Greenhill* v. *United States*, 298 F. 2d 405 (C.A. 5). Here, there was no abuse of this discretion.

Petitioners' objections to rulings by the court allowing the admission of evidence are also without foundation. Testimony that one lender intervened in a civil suit brought against petitioners by the federal government was part of a showing that after the intervention petitioners paid the sums due to the lender in return for his absolving them from liability (R. 163–173). This testimony was relevant since the fact that a lender has been repaid bears on whether the borrower intended to commit fraud. *Linden* v. *United States*, 254 F. 2d 560, 566 (C.A. 4); *Lonergan* v. *United States*, 95 F. 2d 642, 646 (C.A. 9), certiorari denied, 304 U.S. 581. Here the lender was repaid, but the conditions under which this was done were relevant to petitioners' intent. Evidence that an unsalaried worker opened a charge account at a dry goods store in order to obtain clothing for his daughter, and that petitioners refused to supply medical treatment for his wife, was relevant to show the falsity of petitioners' representations that unsalaried workers would be given free school clothing and medical treatment (R. 677–680, 684). Testimony of another witness that he was promised greater rewards if he would sell his home and lend the proceeds to petitioners was relevant in relation to the representations that a lender's share of the profits would depend upon

how great a sacrifice he had made (R. 766–767). It was not hearsay to admit testimony about a conversation held in the presence of petitioner White (R. 740–741). Testimony about the size of a hotel bill charged to petitioner over an eleven-month period was relevant to show the scale of the operation (R. 817). Any possible error in admitting evidence that a state agency ordered petitioners to cease their activities was cured by the court's instructions to the jury (R. 1806–1810). As for petitioners' other objections, either the court excluded the evidence to which petitioners objected (R. 160, 246–249, 843–851, 1800–1801, 2088), or the questions were not answered (R. 1058–1060, 2083–2084), or petitioners made no objection (R. 1092).

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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